

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK**

UPSTATE NEW YORK BAKERY DRIVERS AND  
INDUSTRY PENSION FUND, by Thomas Thayne and  
Rodney Malarchik, Trustees

Plaintiffs,

-against-

OKEN DISTRIBUTING, INC. and HOWARD  
SCHWARTZ, Individually,

Defendants.

**STIPULATION  
AND ORDER  
GRANTING  
JUDGMENT**

Civil Action No.  
06-CV-00385 (NAM/GJD)

**IT IS HEREBY STIPULATED AND AGREED**, by and between Plaintiffs Upstate New York Bakery Drivers Pension Fund by Thomas Thayne and Rodney Malarchik as Trustees, through their undersigned counsel, and Defendants Oken Distributing, Inc. [hereinafter "Oken"] and Howard Schwartz, individually, through their undersigned counsel, as follows:

**RECITALS**

A. The undersigned individuals have full authority required to bind the parties in the above captioned action, as well as the parties' successors, heirs, trustees, administrators, officers, executors, personal representatives, endorses, assigns, subsidiaries, related entities, affiliates, alter egos, and any purchaser, assignee or transferee of Defendant Oken, to the terms of this Stipulation and Order Granting Judgment [hereinafter "Order"] and any judgment and/or order resulting from it.

A handwritten signature, possibly "JL", followed by the initials "DER" in a stylized, slanted font.

B. On March 28, 2006, Plaintiffs filed a complaint against Defendants [hereinafter "Complaint"] [Docket No. 1] pursuant to Sections 4219(c)(5), 4221(b)(1), and 4301(b) of the Employee Retirement Income Security Act of 1974, as amended ["ERISA"] [29 U.S.C. §§1399(c)(5), 1401(b)(1) & 1451(b)].

C. The Summons and Complaint were served upon Defendant Oken on April 4, 2006, and upon Defendant Howard Schwartz on April 12, 2006.

D. Before Defendants filed an Answer pursuant to Rule 12 of the Federal Rules of Civil Procedure, Defendants provided unaudited documents and information to Plaintiffs concerning Defendants' insolvency. Defendants' unaudited documents and information demonstrated that neither Defendant possessed or is likely to possess sufficient assets to satisfy any withdrawal liability or other claim worth more than ten thousand dollars (\$10,000.00). Based on Defendants' unaudited documents and information, the parties reached a settlement agreement forestalling further litigation as described herein.

E. The undersigned parties agree to resolve this litigation under the terms outlined below and in accordance with applicable law as well as the parties' settlement agreement referenced above. The undersigned parties concede that this Court has subject matter jurisdiction over this action and that, by agreeing to a judgment in this matter, the parties voluntarily consent to this Court exercising jurisdiction over them personally.

F. The undersigned parties admit that Defendant Oken was party to collective bargaining agreements with International Brotherhood of Teamsters, Local Union No. 791 [hereinafter "Agreements"]. Pursuant to the Agreements, Defendant Oken was bound by the terms and conditions, rules and regulations of the Restated Agreement and Declaration of Trust

of the Upstate New York Bakery Drivers and Industry Pension Fund and the Upstate New York Bakery Drivers and Industry Pension Fund Withdrawal Liability Policy [hereinafter "Trust" and "Withdrawal Liability Policy"].

G. The aforesaid Agreements and Trust obligated Defendant Oken to remit pension plan contributions to the Fund until Defendant Oken permanently ceased covered operations within the meaning of ERISA Section 4203(a)(2) [29 U.S.C. §1383(a)(2)] on October 31, 2003.

H. On June 2, 2005, the Fund's Trustees sent Defendant Oken notice of withdrawal liability [hereinafter "Notice"] amounting to \$207,181.00 and requiring payment of same in either: (a) one lump sum within ten (10) days of receipt of the Notice; or (b) fifty two (52) quarterly payments of \$5,974.79 beginning sixty (60) days of receiving the Notice, followed by a final payment of \$3,188.86 in accordance with ERISA Section 4219(b)(1) [29 U.S.C. §1399(b)(1)]. Defendant Schwartz received the Notice on June 6, 2005, and Plaintiffs pursued reasonable, diligent, and systematic efforts to collect the withdrawal liability assessed against Defendants.

I. Pursuant to the Agreements, the Trust, and Withdrawal Liability Policy, Defendant Oken admits that it owes Plaintiffs the following:

- (i) \$207,181.00 in withdrawal liability; plus
- (ii) \$12,927.89 in interest as of June 30, 2006; plus
- (iii) \$41,436.20 in liquidated damages as of June 30, 2006; plus
- (iv) \$2,932.50 in attorneys' fees and costs through April 30, 2006.

Thus, as of June 30, 2006, Defendant Oken admits that it owes \$264,477.59.

J. Defendant Schwartz denies that he is personally liable for Defendant Oken's withdrawal liability described above. Defendant Schwartz hereby reserves any and all defenses to the Complaint and/or to the assessment of withdrawal liability made by Plaintiffs. Defendant Schwartz represents that if a judgment were entered against him as demanded in the Complaint, he would file a petition for bankruptcy with the United States Bankruptcy Court for the Western District of New York. Nothing contained herein waives any parties' rights or interests with respect to a determination about whether Defendant Schwartz's debt to Plaintiffs, if any, is dischargeable in bankruptcy pursuant to Sections 523(a)(4) and 523(a)(6) of the Bankruptcy Code [11 U.S.C. §§523(a)(4), 523(a)(6)].

K. The parties agree that the terms of the judgment and order, as set forth below, constitute full and fair settlement of the claims as raised in the Complaint and should be entered as the judgment in this action by the Court. The parties represent and agree that no party to this action is an infant or incompetent person, and that no party to this action is serving in any of the armed forces.

### JUDGMENT AND ORDER

The Clerk of the Court shall enter judgment in the above captioned case in favor of Plaintiffs and against Defendant Oken for the sum of \$264,477.59. The Judgment shall bear interest thereon at the rate provided for by 28 U.S.C. §1961(a), and Plaintiffs shall have execution of said Judgment.

The Clerk of the Court shall dismiss the above captioned case against Defendant Howard Schwartz without prejudice to Plaintiffs' right to reopen the case to seek a judgment against Defendant Schwartz if Plaintiffs discover that the documents and/or information described in paragraph (D) above are false and/or no longer valid. If this case is reopened and resumed against Defendant Schwartz, he retains any and all defenses related to any and all causes of action alleged against him.

DATED: June 13, 2006

DATED: June 29, 2006

**RONALD J. AXELROD, P.C.**

By: 

Ronald J. Axelrod, Esq.

Bar Roll No. \_\_\_\_\_

Attorney for Defendants

Office & Post Office Address

300 Linden Oaks, Suite 220

Rochester, New York 14625-2883

Telephone: (585) 419-8080

Facsimile: (585) 248-4961

e-mail: ron@ronaxelrod.com

**BLITMAN & KING LLP**

By: 

Daniel Kornfeld, Esq.

Bar Roll No. 512729

Attorneys for Plaintiffs

Office & Post Office Address

Franklin Center, Suite 300

443 North Franklin Street

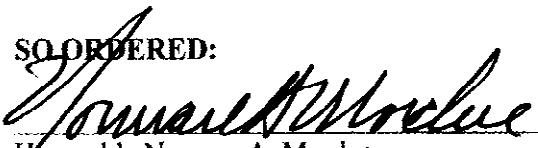
Syracuse, New York 13204

Telephone: (315) 422-7111

Facsimile: (315) 471-2623

e-mail: jacclark@bklawyers.com

**SO ORDERED:**

  
Honorable Norman A. Mordue  
United States District Court Judge

  
DATED: June 5, 2006

(cwf\dek\bakery\oken-stpjdg)